In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-85

OAKLAND RAIDERS, PETITIONER

v.

OFFICE OF EMERGENCY PREPAREDNESS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the Temporary Emergency Court of Appeals (Pet. App. B) and the United States District Court for the Northern District of California (Pet. App. A) are not yet reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on July 10, 1974. The petition for a writ of certiorari was filed on August 7, 1974. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. (1970 ed., Supp. II) 1904 note.

QUESTIONS PRESENTED

1. Whether technical non-compliance with Section 553 of the Administrative Procedure Act, 5 U.S.C. 553, by the President in issuing Executive Order 11615, which im-

posed a 90-day freeze on prices, rents, wages and salaries, requires that the freeze be set aside.

2. Whether the application of Executive Order 11615 to the advance sale of tickets by petitioner constitutes an *ex post facto* law or a taking of petitioner's property without just compensation.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article I, Section 9, clause 3 of the Constitution provides in pertinent part:

No * * * ex post facto Law shall be passed.

The Fifth Amendment of the Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553, and Executive Order 11615 are set forth at Pet. App. D, pp. 51-52, and Pet. App. E.

STATEMENT

Petitioner owns and operates the Oakland Raiders professional football team. In early 1971 petitioner announced an increase in home game ticket prices for the 1971 football season, and approximately 48,000 season tickets for the 1971 season were sold by June 30, 1971.

On August 15, 1971, the President issued Executive Order 11615, 36 Fed. Reg. 15727, which imposed a 90-day freeze upon prices, rents, wages and salaries. According to the terms of the Executive Order, prices were to be stabilized "at levels not greater than the highest of those pertaining to a substantial volume of actual transactions * * * of any kind during the 30-day period ending August 14,

1971, for like or similar commodities or services." If no actual transactions occurred during that 30-day period, the Order prescribed that the maximum price chargeable was "the highest price * * * in the nearest preceding 30-day period in which transactions did occur."

The President delegated to the Cost of Living Council the authority to implement the provisions of Executive Order 11615. The Council then delegated authority to the Office of Emergency Preparedness ("the Office") to implement and administer the provisions of the Executive Order. 36 Fed. Reg. 16215.

On September 2, 1971, the Office issued Circular No. 7, 36 Fed. Reg. 17578, which provided with respect to "transactions" as used in the Executive Order:

> A transaction takes place when the seller ships the product to the buyer, not when the order is received. In the case of a service, the transaction takes place when the service is performed.

The Office further determined, in Circular No. 11, 36 Fed. Reg. 18315, that "[t]he freeze applies to prices of advance sale tickets for sporting events occurring during the freeze."

Petitioner filed suit in the United States District Court for the Northern District of California on November 16, 1971, challenging the validity of the Executive Order as interpreted by the Office. The district court granted the Office's motion for summary judgment and ordered petitioner to refund overpayments to the affected ticket purchasers (Pet. App. A). The court of appeals affirmed (Pet. App. B).

ARGUMENT

The issues raised here are essentially the same as those raised in *The Five Smiths, Inc.* v. *Hollaway*, No. 73-2046,

petition for a writ of certiorari pending, and *University of Southern California* v. *Cost of Living Council*, 472 F. 2d 1065 (T.E.C.A.), certiorari denied, 410 U.S. 928. As to petitioner's contentions that the President violated Section 553 of the Administrative Procedure Act in issuing Executive Order 11615 and that the application of the Executive Order to petitioner constitutes an *ex post facto* law, we rely upon our opposition to the petition for a writ of certiorari in *The Five Smiths*, a copy of which is being furnished to petitioner. We here discuss only petitioner's additional contention that the application of the Executive Order to its advance ticket sales effects a taking of its property for public use without just compensation.

The requirement that petitioner refund overpayments to affected ticket purchasers involves only an impairment of private contractual obligations, not a taking of property for public use, and it has long been established that Congress may, without providing for compensation, interfere with private contracts in the exercise of its legislative powers. *Norman* v. *Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-311; *Louisville & Nashville R. Co.* v. *Mottley*, 219 U.S. 467, 480-483. Cf. *Wright* v. *Union Central Ins. Co.*, 311 U.S. 273. The price control legislation and administrative regulations thereunder are valid exercises of the federal power over commerce, and petitioner accordingly is not entitled to compensation. See, *e.g.*, *Bowles* v. *Willingham*, 321 U.S. 503, 516-519; *Legal Tender Cases*, 12 Wall. 457, 551-552.[1]

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[1] Moreover, the administrative actions petitioner requests this Court to review were temporary measures that remained in effect only 90 days. Since the Economic Stabilization Act expired on April 30, 1974 (87 Stat. 29), the question raised here has no prospective importance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1974.

CERTIORARI DENIED